UNITED STATES DISTRICT COURT

DISTRICT OF MAINE

WILLIAM H. HOWISON,	)	
	)	
Plaintiff	)	
	)	
v.	)	***Civil Docket No. 96-296-P-C***
	)	
JAYNE M. HANLEY,	)	
	)	
Defendant	)	

RECOMMENDED DECISION ON PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT AND DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

The plaintiff, trustee of the bankruptcy estate of debtor James R. McFarlane, Jr., husband of the defendant, brought this adversary proceeding asking the court to avoid the transfer of the debtor's interest in the family residence to the defendant and to award damages in the amount of twice the value of that property transfer. The plaintiff seeks summary judgment as to liability; the defendant seeks summary judgment as to all claims. I recommend that the court deny both motions.

I. Summary Judgment Standards

Summary judgment is appropriate only if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter

of law." Fed. R. Civ. P. 56(c). "In this regard, 'material' means that a contested fact has the potential to change the outcome of the suit under the governing law if the dispute is resolved favorably to the nonmovant. By like token, 'genuine' means that 'the evidence about the fact is such that a reasonable jury could resolve the point in favor of the nonmoving party . . . .'" *McCarthy v. Northwest Airlines, Inc*., 56 F.3d 313, 315 (1st Cir. 1995) (citations omitted). The party moving for summary judgment must demonstrate an absence of evidence to support the nonmoving party's case. *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986). In determining whether this burden is met, the court must view the record in the light most favorable to the nonmoving party and "give the party the benefit of all reasonable inferences to be drawn in its favor." *Ortega-Rosario v. Alvarado-Ortiz,* 917 F.2d 71, 73 (1st Cir. 1990). Once the moving party has made a preliminary showing that no genuine issue of material fact exists, "the nonmovant must contradict the showing by pointing to specific facts demonstrating that there is, indeed, a trialworthy issue." *National Amusements, Inc. v. Town of Dedham*, 43 F.3d 731, 735 (1st Cir.) (citing *Celotex*, 477 U.S. at 324), *cert. denied*, 132 L. Ed. 2d 255 (1995); Fed. R. Civ. P. 56(e). "This is especially true in respect to claims or issues on which the nonmovant bears the burden of proof." *International Assn. of Machinists & Aerospace Workers, AFL-CIO v. Winship Green Nursing Ctr*., 103 F.3d 196, 200 (1st Cir. 1996) (citations omitted).

The mere fact that both parties seek summary judgment does not render summary judgment appropriate. 10A C. Wright, A. Miller & M. Kane, *Federal Practice and Procedure* ("Wright, Miller & Kane") § 2720 at 19. For those issues subject to cross-motions for summary judgment, the court must draw all reasonable inferences against granting summary judgment to determine whether there are genuine issues of material fact to be tried. *Continental Grain Co. v. Puerto Rico Maritime*

Shipping Auth., 972 F.2d 426, 429 (1st Cir. 1992). If there are any genuine issues of material fact, both motions must be denied as to the affected issue or issues of law; if not, one party is entitled to judgment as a matter of law. 10A Wright, Miller & Kane § 2720 at 24-25.

II. Background

On April 30, 1993, James R. McFarlane, Jr., transferred to the defendant, his wife, his one-half interest in the family residence located in Scarborough, Maine, for which she paid no direct consideration. Rule 2004 Examination of James R. McFarlane ("McFarlane Exam.") at 3-4, 21, 55-56. In September 1995 McFarlane filed a petition under Chapter 7 of the Bankruptcy Act. Complaint (Docket No. 1a) ¶ 1; Answer (Docket No. 3) ¶ 1. The plaintiff in this adversary proceeding is the trustee of McFarlane's bankruptcy estate. Complaint ¶ 2; Answer ¶ 2. On the date of the transfer, as well as on the date of filing of the Chapter 7 proceeding, William Hobbs held an unsecured claim against McFarlane. Deposition of James R. McFarlane, Jr. ("McFarlane Dep.") at 9, 14; Claims Register, *In re James R. McFarlane, Jr.*, Docket No. 95-20793 (Bankr. D. Me.). On the date of the transfer, the sum of McFarlane's debts was greater than his assets. McFarlane Exam. at 51-52. McFarlane testified that he transferred his interest in the residence to the defendant because he thought it was best for his family. *Id*. at 57. The defendant argues that McFarlane received value for his interest in the residence as a result of the transfer in that some of the proceeds of a refinancing of the mortgage on the property which occurred at the time of the transfer were used to pay off a lien placed on the property by the Internal Revenue Service ("IRS"). *Id.* at 52.

The date for designation of expert witnesses in this action has passed. Scheduling Order (Docket No. 5) at 2.

III. Analysis

The parties agree on certain basic points. The plaintiff trustee seeks to avoid the transfer under 11 U.S.C. § 544(b), which provides:

> The trustee may avoid any transfer of an interest of the debtor in property or any obligation incurred by the debtor that is voidable under applicable law by a creditor holding an unsecured claim that is allowable under section 502 of this title or that is not allowable only under section 502(e) of this title.

The applicable law is the Maine Uniform Fraudulent Transfer Act, 14 M.R.S.A. § 3571 *et seq*. (the "Act"). The defendant does not dispute that there is a creditor holding an unsecured claim that is duly allowable. The plaintiff asserts that the transfer is voidable under any of three sections of the Act: 14 M.R.S.A. §§ 3575(1)(A), 3575(1)(B), and 3576(1). Plaintiff's Motion for Partial Summary Judgment (Docket No. 9) at 4-7. The defendant does not address any of these sections directly but instead argues that the plaintiff cannot establish that a transfer, as that term is defined in the Act, took place, because he has presented no admissible evidence that the property at issue was an asset of McFarlane -- that is, that McFarlane's interest had value at the time of transfer. Defendant's Memorandum of Law in Opposition to Plaintiff's Motion for Summary Judgment (Docket No. 14) at [2]-[5]. Thus, she contends, the conveyance cannot be voided as fraudulent, regardless of the factual circumstances. *Id.*

The defendant's own motion for summary judgment is based on a similar argument. She asserts that the plaintiff's failure to name an expert witness on the question of value is fatal to his claims.

A. Defendant's Motion for Summary Judgment

The defendant's motion for summary judgment is based solely on the alleged absence of an expert witness to testify as to the value of the property on the date of the transfer. This is the sole statement included in the statement of material facts that accompanies her motion. Defendant's Statement of Undisputed Facts (Docket No. 13). Unfortunately, the defendant fails to support that statement with a citation to the record, as required by this court's recently supplanted Local Rule 19(b)(1).[1] Designations of expert witnesses are not filed with the court in this district. *See* old Local Rule 18(d); new Local Rule 26(a). Even though the plaintiff has not controverted this statement, it cannot be deemed to be admitted in the absence of appropriate support. Old Local Rule 19(b)(2); new Local Rule 56. Therefore, there is no support for the motion, and it must be denied. *Donnell v. United States*, 834 F. Supp. 19, 21 n.1 (D. Me. 1993).

In any event, the defendant's position is incorrect under applicable law. A person who was the owner of the property at the time of transfer may testify about its value. *Kleinschmidt v. Morrow*, 642 A.2d 161, 164 (Me. 1994); *see also Joe T. Dehmer Distrib., Inc. v. Temple*, 826 F.2d 1463, 1466 (5th Cir. 1987) (same; bankruptcy case concerning alleged fraudulent conveyance). The defendant is not entitled to summary judgment as a matter of law.

B. The Plaintiff's Motion for Partial Summary Judgment

The plaintiff argues that he is entitled to summary judgment as to liability on any of three separate statutory grounds. The first, 14 M.R.S.A. § 3575(1)(A), provides:

[1] Effective March 1, 1997, new Local Rules were adopted by this court and all prior rules were superceded thereby. The Local Rule applicable after that date, Rule 56, contains language identical to that of the prior Rule 19(b)(1) and (2). The prior rule is applicable to the motions at issue here, which were filed before the effective date of the revised rules.

> A transfer made or obligation incurred by a debtor is fraudulent as to a creditor, whether the creditor's claim arose before or after the transfer was made or the obligation was incurred, if the debtor made the transfer or incurred the obligation:
>
> A. With actual intent to hinder, delay or defraud any creditor of the debtor.

The plaintiff asserts that McFarlane's deposition testimony establishes this actual intent. At his Rule 2004 examination, McFarlane testified that he transferred his interest in the property to the defendant because "I thought it was probably the best for my family that I didn't own it." McFarlane Exam. at 57. The plaintiff also relies on the following exchange:

> Q. In other words, you didn't want that asset available if someone sued you, correct?
>
> A. That crossed my mind.
>
> Q. I'm right?
>
> A. Pardon me?
>
> Q. I'm correct?
>
> A. Yep.

Id. at 58. However, neither statement necessarily constitutes an admission that the transfer was intended to hinder, delay or defraud any creditor.

14 M.R.S.A. § 3575(2) sets forth factors to be considered in determining actual intent, but the plaintiff does not address any of these factors in his statement of material facts. *See* Plaintiff's Statement of Undisputed Facts ("Plaintiff's SMF") (Docket No. 10). Evidence not cited in a statement of material facts is not properly before the court on summary judgment. *Pew v. Scopino,* 161 F.R.D. 1, 2 (D. Me. 1995). The court will not look beyond a party's Rule 56 (formerly Rule

19(b)) statement. *Id.* n.1. The plaintiff is not entitled to summary judgment, based on the presentation he has made, on his first asserted statutory ground.

The plaintiff's argument based on the two remaining statutory grounds suffers from the same infirmity under this court's local rules. Both asserted grounds require evidence that McFarlane did not receive reasonably equivalent value in exchange for the transfer. 14 M.R.S.A. §§ 3575(1)(B) and 3576(1). The plaintiff's statement of material facts states only that McFarlane transferred his interest in the property to the defendant "for no consideration." Plaintiff's SMF ¶ 2. This assertion is properly disputed by the defendant. Defendant's Statement of Disputed Facts (Docket No. 16) ¶ 2. The plaintiff provides nothing further in his statement of material facts concerning this issue, which is critical to his position.[2] Therefore, he has not demonstrated an absence of evidence to support the defendant's case, and he is not entitled to summary judgment on either of these grounds. *See McDermott v. Lehman*, 594 F. Supp. 1315, 1321 (D. Me. 1984) (moving party will not be granted summary judgment unless statement of supporting facts will support summary judgment as a matter of law).

IV. Conclusion

For the foregoing reasons, I recommend that the plaintiff's motion for partial summary judgment and the defendant's motion for summary judgment be **DENIED.**

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[2] The plaintiff also fails to offer support for the necessary factual elements of 14 M.R.S.A. § 3575(1)(B)(1) and (2). The portions of the record cited for these points in his statement of material facts do not necessarily establish that McFarlane was engaged in a business for which his remaining assets were unreasonably small or that he reasonably should have believed that he would incur future debts beyond his ability to pay.

NOTICE

A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) for which de novo review by the district court is sought, together with a supporting memorandum, within ten (10) days after being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.

Failure to file a timely objection shall constitute a waiver of the right to de novo review by the district court and to appeal the district court's order.

Dated this 28th day of March, 1997.

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David M. Cohen
United States Magistrate Judge